Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ERIC WAYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. *Apprendi v. New Jersey* is retroactive to Eric Wayne's Motion to Vacate because it announced a watershed rule of law and the Eighth Circuit erred when it granted the United States' Motion to dismiss:

A. Mr. Wayne is litigating his first, properly amended 2255 petition.

B. All elements of a crime must be decided by a properly instructed jury utilizing the standard of beyond-a-reasonable-doubt.

C. Weight is an element of drug offenses which was contained in his indictment but was not proven to his jury, rather the determination was made solely by the trial court.

D. Eric Wayne's jury was specifically forbidden from considering the weight of the controlled substance by instruction from the Court.

Mr. Wayne presented unrefuted evidence of governmental misconduct–such as Governmental manipulation of *Brady v. Maryland* and of the discovery process–as well as ineffective assistance of counsel issues for which certificate of appealability was wrongfully denied by the Eighth Circuit. See, (Appendix 1a).

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit filed November 20, 2001.

OPINION BELOW

The Order dismissing the appeal is attached as Appendix 1a.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

The United States District Court for the Northern District of Iowa had jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 2255. The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

RELEVANT PROVISIONS INVOLVED

Questions I and II implicate the Fifth Amendment to the United States Constitution, which provides, in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property without due process of law . . .

Questions 1 and 2 implicate the Sixth Amendment to the United States Constitution, which provides, in relevant part that:

> In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation . . . and to have the Assistance of

Counsel for his defense.

Rule 23. Trial by Jury or by the Court

(a) **Trial by Jury**. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Rule 31 Verdict

The verdict shall be unanimous . . .

STATEMENT OF THE CASE

A. Proceedings Below

We are before this Court because the United States Court of Appeals for the Eighth Circuit granted the Government's Motion to Dismiss Mr. Wayne's appeal taken from the denial of his properly amended *first* Motion to Vacate. (Appendix 1a)

The Magistrate Judge had previously found that: *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (*Apprendi)* applied, Wayne had properly amended his petition, *Teague v. Lane*, 489 U.S. 288 (1989) (*Teague)* did not apply but that if it did Mr. Wayne's case fell under both exceptions thereto. He recommended that Mr. Wayne's sentence be vacated and that a sentence under Section C of Title 21 U.S.C. § 841 be imposed. He recommended denial without evidentiary hearing on the other grounds alleged.

No evidentiary hearing was held by the Magistrate Judge nor the District Judge, although oral argument was permitted and various written submissions were made.

The District Court upheld that portion of the

Magistrate's finding denying an evidentiary hearing but denied Mr. Wayne's *Apprendi* claim. However, it *sua sponte*, issued a Certificate of Appealability on the *Apprendi* issue. A timely Notice of Appeal was filed. A further request for Certificate of Appealability on the remaining issues was first submitted to the trial court and later to the Court of Appeals. Both courts denied relief.

B. Statement of Relevant Facts

Mr. Wayne was sentenced to a period of incarceration of 300 months' time (Appendix 6a -12a) although the determination of the sentence was arrived at solely by a trial judge and the jury was specifically instructed not to consider weight of the drugs even though the amount of drugs was indicated in the Indictment. (Appendix 2a-4a).

Additional facts relevant to the issues before this Court are set out in their respective portions of Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

Mr. Wayne will divide this presentation into two distinct portions: the first will reflect the general state of the law post-*Apprendi* and the second will discuss why an *Apprendi* error is cognizable in a Motion to Vacate.

A. Introdudction

Mr. Wayne filed his first and only 2255 petition in 1997 and was granted leave to amend that petition to include his position that his case fit squarely within the parameters of *Apprendi*.

His appeal to the Eighth Circuit was dismissed based upon that court's holding in *United States v. Moss, infra*.

He asks the logical question: If drug quantity is now

firmly established as an element of the drug trafficking statutes,[1] and as such the Government must prove the quantity before a unanimous jury for those at the trial stage; and if those currently at the appellate stage of their proceedings will have their sentences reviewed under *Apprendi*, how can those who properly raised this issue in their first 2255 petition be told that they have no recourse when *Apprendi* created a watershed change in the law?

Although nearly 2500 cases have cited to *Apprendi* at this time in the federal courts alone, courts across the land are in discord on the important issue of whether *Apprendi issues* may be raised in first petitions submitted under 28 U.S.C. § 2255. The fact that only three Circuits.[2] have directly spoken to the issue does not recognize the disagreement which is evident in lower court decisions. In other words, this is a critically important and divisive issue and must be addressed by this Court.

It is apparent that this Court is attempting to address the many and varied interpretations of *Apprendi* by the various courts. It has accepted Certiorari and heard argument on the applicability of *Apprendi* to Title 18 U.S.C. § 924(c) and to Title 21 U.S.C. §841(b)(1); and will soon hear argument on an Arizona death penalty matter. This issue of retroactivity to pending § 2255 petitions is of equal constitutional importance.

It seems as if the lower courts are parsing out in their respective reasoning "categories" of *Apprendi* litigants.

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[1]The Government concedes as it must that after *Apprendi* its Indictments must charge threshold drug quantities and must establish those quantities beyond a reasonable doubt to a trial jury. See, cases gathered on this proposition in the original appellate decision to be found at *United States v. Cotton*, 255 F. 3d 150 (4th Cir 2001).

[2]*United States v. Moss*, 252 F. 3d 993 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001; and *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001).

A. Those filing their second, third 2255 motion;

B. Those attempting to circumvent 2255 strictures by filing under Title 28 U.S.C. § 2241;

C. Those individuals who were denied the right to amend their pending petitions;

D. Those on direct appeal;

E. Newly convicted individuals.

Some of the distinctions being made include:

1. Whether the defendant pled guilty

2. Whether the sentence imposed was in excess of the statutory maximum;

3. Whether the Indictment contained specific allegations of quantity of contraband;

4. Whether the jury was instructed on the issue of quantity or weight or, as in Mr. Wayne's case, whether the jury was specifically ordered not to consider weight;

5. Whether the defendant articulated an "elements" argument before or after Jones and Apprendi.

6. Whether a plain error or a noticed error analysis should apply–which includes reference to the lack of weight of the evidence such as in ths case–and whether sentences above 240 months' incarceration are per se plain error.

7. Whether an Apprendi error divests the sentencing court of jurisdiction; and

8. Whether Apprendi applies to guideline calculations

and enhancements.

This non-exhaustive list speaks to the urgency with which this Court should address issues such as Mr. Wayne's.

It must be noted that the cases speaking to other facets of the *Apprendi* question do not inform this Court's decision whether to review Mr. Wayne's case. He is in the unique position of presenting his initial 2255 to the Court; having that trial Court permit him to amend his claim to include *Apprendi*. His position is also starkly different from the routine: *his jury was informed of approximate quantities in the Indictment yet was forbidden to consider weight.*

In pertinent part Jury Instruction Number 13 read:

> ...The United States is not required to prove that the amount or quantity of cocaine and marijuana was as charged in the Indictment. It need only prove beyond a reasonable doubt that there was a measurable amount of cocaine and/or marijuana as charged in each respective count. (Appendix 5a)

This instruction was given in spite of the fact that the Government was well aware of the importance of weight to its ultimate goal of lengthy incarceration. Between its initial Indictment filed May 19, 1988 and its Superceding Indictment filed August 24, 1988 it amended not only the dates of certain counts but also its "approximation" of the weights of controlled substances involved.

B. *No Constitutionally Valid Conviction Can Be Obtained Nor Sentence Imposed When the Government Fails to Establish the Element of Quantity Before the Petit Jury Beyond a Reasonable Doubt.*

Apprendi v. New Jersey[3] Mandates Such a Result and it Is Required That this Watershed Change in the Law and Practice of Federal Courts Be Given Retroactive Application to Those Whose § 2255 Petitions Were Pending at the Time That Apprendi Was Decided.

Mr. Wayne's jury was put in the unenviable position of being presented with approximations of the quantities of controlled substance and forbidden from considering that quantity. He was convicted of a crime by virtue of the Government being relieved of its duty to present evidence beyond a reasonable doubt on all elements of the crime. He was sentenced on no more than a guess at estimated drug quantity.

Preclusion of an essential element of the crime from the jury's consideration

This is a simple case based upon a simple concept. Substantive Constitutional law provides that a ll elements of a crime must be proven to a jury. No judge can supplant the wisdom of the jury by, essentially, taking 'judicial notice' of a fact necessary to establish the conviction.

Prior to *Apprendi*, courts uniformly relegated quantity of controlled substances to a judicial determination. This was true under pre-guideline law and was expanded under the Guidelines. Since *Apprendi*, quantity is universally seen as an element rather than an issue for sentencing. This watershed change in the law should be applied to § 2255 litigants.

Apprendi, supra forbids the trial court from usurping the role of a petit jury. No citizen may be convicted of a crime unless a jury has found adversely to him on every element of the crime for which he is accused. All Circuits which have addressed the issue have found that, under *Apprendi*, quantity of a controlled substance is an element of federal drug offenses.

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[3]530 U.S. 466 (2000).

Stirone v. United States, 361 U.S. 212 (1960) is instructive. *Stirone* granted relief when proof at trial on an essential element departed from the manner of the allegation. Here we have a situation where an element of the crime is knowingly kept from the petit jury's consideration and then "found" by the trial court.

When a court is faced with such a situation it must either grant acquittal or a new trial depending on the factual circumstances. In no case may it take judicial notice of or substitute its judgment on a missing element.

See, for instance, *United States V. Martin Linen Supply Co. Et Al.* 430 U.S. 564 (1977) and *Beem v. McKune*, 278 F.3d 1108 (10th Cir. 2002). Discussion *infra.*

C. Requirement of an Indictment which contains all elements of the crime and a unanimous jury were breached in this case.

It is clear that the Constitution as well as Rule 23 of the Federal Rules of Criminal Procedure require that all federal crimes be tried by Indictment unless the defendant waives such right; the trial court approves; and the Government consents. It is equally clear that a conviction can only be obtained upon an adverse finding on all elements of the crime by the fact finder–in Mr. Wayne's case the jury. F.R. Crim. P. 31.

Here, Mr. Wayne's Indictment was flawed as it only "approximated" a quantity of drugs, and he was denied a jury trial on the element of quantity, hence his conviction cannot stand for these reasons alone.

It is clear that the Due Process Clause protects "the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime . . . In re Winship*, 397 U.S. 358, 364 (1970). Quantity is necessary to underlay a conviction under either Title 21 U.S.C. §§ 841(b)(1)(A) or (b)(1)(B). This element was not

submitted to the jury, hence not every fact necessary to constitute the crime was established by a jury.

Compliance with *Winship* protects a defendant's interest in being free from unjustified loss of liberty; from the stigmatization resulting from conviction; and it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. *Id.*, at 363-364.

It Constitutionally follows that the Government at trial must establish each of the elements beyond a reasonable doubt, and then, and only then, can a conviction or sentence be based upon these findings.

This public perception component of due process cannot be overemphasized. Not only must we do justice, we must appear to do justice. It would be a rare member of the public indeed who, after being told that all elements of a crime must be proven to a jury beyond a reasonable doubt and further told that one element was not submitted to the jury, would conclude that the conviction could stand. Common sense dictates otherwise.

D. A trial court may not take judicial notice of a missing element.

Clearly the failure to submit an element to the jury could be easily "overlooked" if the trial court had the ability to substitute its own judgment for that of the jury. This substitution of the court's judgment for that of the grand and petit juries is exactly what is proposed when courts uphold the omission of an element because, for instance, "no rational jury could fail to find" certain quantities.

The Tenth Circuit recently held, in *Beem v. McKune*, 278 F.3d 1108 (10th Cir. 2002) that, despite the ease with which the particular trial court could "fill in" the missing element from "common knowledge," taking judicial notice of any element of a crime was prohibited.

The Tenth Circuit framed the issue as "whether [the defendants] may be sentenced and imprisoned for crimes for which they were not charged, tried or convicted." *Id.*, at 1109. The two defendants in these separate cases were tried, *inter alia*, for indecent liberties with a child and aggravated assault as to Beem and rape as to Henson.

After success on appeal, the Kansas courts remanded both Beem's and Henson's cases for resentencing on a different crime–aggravated incest. The State argued that the sentences were proper because the primary elements of due process were met–notice and an opportunity to defend and that the element of relationship with the child was at that time undisputed.

In its analysis, that Court reasoned that the defendants "were indicted under charges that did not include all necessary elements of aggravated incest. Additionally, Defendants did not proffer a defense regarding the missing elements and their juries were not instructed as to all elements . . . The only conceivable way we can permit [the sentences] to stand is to take judicial notice of the essential element of kinship–an impermissible endeavor." *Id.*, at 1112.

The instant case is analogous. Mr. Wayne was tried on a charge which the trial court ruled was complete. Now it is apparent that an element was missing which was not submitted to the jury and decided by them. The court is not now free to substitute its judgment for that of the jury.

It is respectfully suggested that Mr. Wayne's conviction on a faulty Indictment should not stand. However, if sentencing is found to be appropriate, it must be to a period calculated based upon what the jury actually found: a quantity of controlled substance, to wit marijuana.

See Count 5, Indictment, (Appendix 2a-4a). Since both marijuana and cocaine are included in the indictment and since both were contained in the jury instruction, it is respectfully submitted that the Rule of Lenity requires

imposition of sentence only on the marijuana accusation.

E. Omission of an essential element of the crime divests the sentencing court of jurisdiction to impose a sentence except under the lowest non-designated amount or in the alternative creates structural error.

1. Absence of jurisdiction

Although Courts of Appeal which have considered this issue in the context of direct appeals have taken the position that failure to submit quantity to a petit jury is error, they have not found it to be structural error. Mr. Wayne disagrees.

We are guided by this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991). It teaches that if the error affects the very framework in which a trial proceeds, reversal is automatic.

In a recent discussion in the dissent to *United States v. Benehaley*, 281 F.3d 423 (4th Cir. 2002), Judge Luttig opined that the reasoning of *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001)(*en banc)*, "leads inexorably to the conclusion that the actual convictions under section 841, and not merely the sentences imposed . . . are invalid, whenever merely 'a quantity' of controlled substance is charged in the underlying indictment. *Id.*, *at* 426

Judge Luttig continues that utilizing Title 21 U.S.C. Section 841(b)(1)(C) as a catch all is incorrect. "...it follows that an indictment that alleges only 'a quantity' of the drug in question does not charge a section 841 offense at all." *Id.*

II. United States v. Moss, supra, incorrectly applied *Teague v. Lane.*

There exists no question but that drug quantity is an

element of a drug trafficking crime.[4] If quantity were removed from the matrix of Mr. Wayne's sentencing, he could receive no greater than a twenty year guideline sentence. This *Apprendi* error increases his guideline sentence by five years' time.

Although we do not have the benefit of the Government's positions on the issues which were to be raised in the appeal, we do know that they rely in their Motion to Dismiss Appeal on the fact that the Circuit decided *Moss, supra.* Presumably from that flows the position that *Teague v. Lane*, 489 U.S. 288 (1989) forecloses Mr. Wayne's relief. That position is incorrect.

A. Apprendi creates a new rule of substantive law, therefore Teague does not apply.

Teague does not foreclose collateral relief. *Teague* distinguishes between a new constitutional rule "of criminal procedure" and a change in substantive law. Although it is true that the holding in *Apprendi* is new, it is most certainly not one of criminal procedure but rather one of new substantive law; much as the new rule announced in *Bailey v. United States*, 516 U.S. 137 (1995) which was applied on collateral review in *Bousley v. United States*, 523 U.S. 614 (1998).

Bousley noted that the distinction between substance and procedure is particularly important in the context of a habeas petitioner. Here the fact that Mr. Wayne elected a jury

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[4]See, for instance, *United States v. Thomas*, 274 F.3d 655 (2nd Cir. 2001)(*en banc)*, and the cases cited therein, including *United States v. Promise*, 255 F.3d 150 (4th Cor. 2001)(*en banc*); *United States v Strayhorn*, 250 F.3d 462 (6th Cir. 2001); *United States v. Fields*, 242 F.3d 393 (D.C. Cir.) Clarified on reh'g 251 F. 3d 1041 (D.C. Circuit 2001); *United States v. Hishaw*, 235 F. 3d 565 (10th Cir. 2000), cert denied 150 L.Ed.2d 241; 121 S. Ct. 2254 (2001); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000), cert denied, 531 U.S. 1177 (2001); *United States v. Rogers*, 228 F. 3d 1318 (11th Cir 2000), abrogated on other grounds by *United States v. Sanchez, supra*, and *United States v. Nordby*, 225 F. 3d 1053 (9th Cir. 2000).

trial and that he was sentenced based upon facts found only by a judge speaks to the substantive failure of the trial rather than a procedural failure.

Consideration of what was at issue in *Bousley* and what is at issue in the present case is instructive. The *Bousley* court teaches that habeas corpus itself exists, in primary part, "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Bousley* , at 620. (Citations omitted).

B. Innocence of crimes for which he was sentenced.

Another facet of this problem has been largely ignored by the courts in their consideration of the issue of retroactivity of *Apprendi*. The cases stress that actual innocence is the cornerstone of consideration.

However, the cases relied upon for this proposition by and large pre-date the Sentencing Guidelines. Pre Guidelines there was no fact finding by the trial court which required certain placement of a defendant on a sentencing grid. The judge was free to consider any evidence; he was not fettered by required minimum mandatory sentences; nor was he restricted by guideline calculations.

Sentencing Guidelines, as any practitioner knows, create a second mini-trial. Cases discussing only absolute factual innocence of *any offense* leave out what is in a practical sense the most important thing to the defendant: the length of his sentence, and makes that the subject of a second trial with separate, hearsay evidence which does not have to be established beyond a reasonable doubt.

What *Apprendi* wrought is a shifting of what facts may be considered at which "trial." Since it is patent that the fact of quantity of drugs must be considered at the first-jury-trial, no sentence over 240 months may stand.

In other words, if "actual innocence" is to be the cornerstone of consideration, then it must be conceded that the defendant who receives a sentence under Title 21 USC 841(b), when the *government is not put to its proof of the factors which enhanced the sentence*, is innocent of the enhancements.

The Magistrate Judge in Mr. Wayne's case recognized this fact and considered *Bousley* and *Reed v. Ross*, 468 U.S. 1 (1984), and, after reviewing the record found that "Wayne could not have been expected to raise a claim in his initial petition [discussing the permitted amended petition] for which no legal basis existed at the time the petition was filed...and is excusable [at any rate] because to allow the amendment would result in a fundamental miscarriage of justice."

One cannot escape the similarities between the "active employment" element in *Bailey* and the "drug quantity" element after *Apprendi*. It is patently clear that *Bailey* redefined what conduct constituted the offense, *Apprendi* actually results in the conclusion that there are many "crimes" defined by § 841, hence to hold Mr. Wayne to the most punitive of those enumerated crimes is to permit him to stand convicted of a crime for which no jury returned a verdict.

In other words, assuming arguendo that this is not a question of absolute innocence, there is at least innocence of the two crimes which *Apprendi* rationale requires, that is § 841(b)(1)(A) and (B).

C. Mr. Wayne prevails Using the Teague *Analysis*

Apprendi wrought a change in substantive law. *Teague* does not apply and retroactive application of *Apprendi* is automatic.

However, even if this Court utilizes the *Teague*

analysis there remains no retroactivity bar to Mr. Wayne's first petition because situations such as the instant fit exactly into the exceptions of *Teague*. *Teague* provides that a new rule should be applied retroactively if it prohibits "a certain category of punishment for a class of defendants...." *Graham v. Collins*, 506 U.S. 461,477 (1993) This is exactly the situation which obtains here and a mirror image of that presented by Mr. Wayne's trial Judge, Hansen, who now sits on the Eighth Circuit and who wrote the *Moss* opinion.

Judge Hansen noted the unfairness which could obtain if Congress were to make all drug offenses subject to a maximum life sentence and then permit courts to apply the guidelines. He worries that those convicted under this "new" scheme would have no recourse while those who were convicted under the present scheme could use *Apprendi* to obtain relief. Yet his analysis leaves no recourse for those similarly situated to Mr. Wayne.

Had Wayne been awaiting trial in 2002, his Indictment would have been precise; the witnesses who testified against him would have been vigorously cross-examined on "weight" and their "recollections" of "about" thus and such could easily have been rejected by a rational jury.

If he were on direct appeal he could argue the *Apprendi* error. Judge Hansen does not want to create a unique class of people who are being punished more harshly than another class yet *Moss* does exactly that–those who are litigating their *first* 2255 are precluded from relief and, as the dissent in *Moss* states, the extra ten years in his case is dismissed as unworthy of addressing.

Further, even if *Teague* is to be applied, the "watershed" nature of *Apprendi* is patently apparent. This requires two elements: it must be implicit in the concept of ordered liberty" and "crucial to the accuracy of adjudication." *(Graham* at 478, quoting *Teague, 489 U.S. at 311)*.

The Magistrate Judge found that Mr. Wayne's case fell

under both exceptions to the *Teague* rule. The conviction was final; *Apprendi* constituted a new rule because it either "breaks new ground, 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Graham* at 467 quoting *Teague* at 301).

A watershed rule must also speak to a bedrock principal essential to fairness. There is no question but that each circuit which had considered whether quantity of controlled substance was an "element" before *Apprendi*, held in the negative. Similarly, all are unanimously in accord that weight is an element of the crime which must be proven beyond-a-reasonable-doubt to a jury. (See cases gathered *infra*, at n.1).

Of course *Apprendi* cases present a consideration of the value of a jury and the utilization of a "beyond a reasonable doubt" standard to adjudicate elements of a crime. Courts have held that rules involving the reasonable doubt standard satisfy the reliability prong, while rules involving the jury trial guarantee satisfy the fundamental fairness prong of *Cage v. Louisiana*, 498 U.S. 39 (1990). Like *Cage*, Apprendi involves both the reasonable doubt standard and the jury trial guarantee and therefore implicates the accuracy and fairness of criminal proceedings.

Apprendi itself emphasized the sanctity of the reasonable doubt standard vis-a-vis sentencing enhancement analysis, noting that it was necessary to reduce the risk of taking a person's liberty without benefit of lawful process.

Apprendi reiterated that the Constitution guarantees a jury determination of each and every element of a crime and that to permit a judge to make such determinations departs from the Constitutional underpinnings of the right to a trial by jury.

C. The impact on the right to cross examine

It is unquestioned that cross examination of Government informant witnesses about quantity was a losing proposition for defense counsel and their clients because of the state of the law, pre *Apprendi*. It was irresponsible for a trial attorney to "haggle" with an informant about whether there were, for instance, two or three kilograms of cocaine in the box. By doing so he or she would be "admitting" that there were at least two kilograms and "admitting" to the crime.

This disincentive to cross-examine was patent in Mr. Wayne's case. Government witnesses rambled about their dealings and were so unreliable that the trial court dismissed two of the counts of conviction after learning that the witness had previously testified before this judge, questioned by this prosecutor, and swore that he kept no notes of his drug transactions. However, defense counsel ferreted out post-trial that the very drug ledgers which he "did not keep" which were in the hands of the Government which purported to utilize an "open file discovery" policy.

For any or all of these reasons, the Court should find that the *Teague* rule does not apply where an *Apprendi* error is at issue, or, in the lesser alternative, if it does apply, the rule of *Apprendi* falls within an exception to the *Teague* doctrine and may be applied retroactively to cases on collateral review."

D. Reasons underpinning Teague *analysis fail in this case.*

1. Finality

If this Court finds, consistent with the reasoning of various courts of appeal that an *Apprendi* error does not affect the underlying conviction but rather speaks to the imposition of a sentence under the "catch-all" provision of Title 21 U.S.C. § 841(b)(1)(C), there will be no impact on the

finality of determinations of guilt, merely readjustment to a sentence consistent with a trial wherein the Government did not present evidence of quantity and where the court did not submit such evidence to the jury.

2 Juries and judges are the same when they consider evidence.

The *Sanders*, *supra*, court based its decision in part upon the reasoning that the result reached by juries and by judges would not be much different. This principle, carried to its logical conclusion, would permit judicial adjudication without benefit of trial. The Government is already successfully arguing that the failure to instruct the jury or the downright misleading the jury on an element of a crime is not such error as should bring vacation of a sentence. The substitution of a judge's determination–which seriously erodes Sixth Amendment concerns–should not be permitted.

II. Mr. Wayne presented issues of Constitutional importance–such as Governmental manipulation of Brady v. Maryland and of the discovery process and specific instances of ineffective assistance of counsel[5]--for which certificate of appealability was denied by both the district court and the Court of Appeals which mistakenly found that Mr. Wayne's objections to the magistrate's report were insufficiently specific to preserve them for review.

Title 28 USC, section 636 (b)(1), provides that a judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Courts have interpreted this language as imposing a specificity requirement, "The filing of objections to the magistrate's report enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties's dispute."[6]

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[5]See Appendix 13a through 18a.

[6] *Thomas v. Arn*, 474 U.S. 140, 147 (1985)

Here, the disputed portion of objection to the report reads:

> [the report] denies Mr. Wayne's relief on his claims under *Brady/Kyles*; ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and ineffective assistance of counsel relating to sentencing. Mr. Wayne has thoroughly briefed these issues for the Magistrate Judge and has participated in oral presentations as well. He would refer this Court to those presentations. He respectfully submits that errors of fact and law were made by the Magistrate Judge and that the Court erred when relief was not given on each of the aforementioned relief bases.

The district court refused to enlarge the certificate of appealability because it reasoned that prior arguments and submissions are not written objections to such findings and recommendations as contemplated by the rule, "precisely because such arguments and submissions were made before the magistrate judge ever filed proposed findings and recommendations."[7]

But other courts have found no such problems with incorporated submissions. In *Kelly v. Withrow*, the Sixth Circuit Court of Appeals directly addressed the sufficiency of objections that incorporate prior submissions by reference and, although not endorsing the practice, the court refused to bar Kelly's claims from review.[8]

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[7] Order Regarding Petitioner's Request for a Certificate of Appealability, at 3.

[8] 25 F.3d 363, 366 (6th Cir. 1994); *Neuman v. Rivers*, 125 F.3d 315, 322 (6th Cir. 1997); See also Williams v. K & B Equipment Co., Inc., 724 F.2d 511 (5th Cir. 1984)(an objection that incorporated an earlier more specific pleading was sufficiently specific to put the district court on notice of the urged error.); *F.D.I.C. v. Zook Bros. Const. Co.*, 973 F.2d 1448 (9th Cir. 1992)(failure to object to magistrate judge's conclusions of law does not automatically bar raising objection on appeal, especially where both parties

It is respectfully submitted that to preserve a magistrate's adverse finding for review, the objection must be sufficiently specific to apprize the judge of specific areas of disagreement between the parties.

Here, the magistrate denied an evidentiary hearing, a circumstance that left Wayne unable to augment his earlier presentations and yet reluctant to merely reiterate them. Attempting to serve the specificity requirement's purpose, Wayne's objection listed the disputed grounds and incorporated by reference earlier submissions that discussed those grounds fully. The grounds are preserved and should have been visited by the trial court as well as by the Circuit.

Moreover, the term "specific" as it is used in section 636, has been interpreted to only require that a party specify each issue for which review is sought and does not call for a discussion of the factual or legal basis of the objection.[9]

In *Beem v. McKune*, *supra*, the Tenth Circuit considered certificates of appealability for two 2254 petitioners. That court stated that the standard, since the lower court had denied the certificate, was for the appellants to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." citing to *Slack v. McDaniel*, 529 U.S. 473 (2000).

Mr. Wayne raised substantial constitutional issues (See Appendix 13a-18a) and none of those issues was considered by the district court because of what it termed the sufficiency of the objections. Since there had been no hearings, no evidence in affidavit or other form presented by the Government, there was nothing to add. Had Mr. Wayne been granted a hearing he would have testified consistent with the allegations in the moving papers. He was denied that opportunity.

As this Court recently reiterated, some issues which

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have had the opportunity to address the question.)

[9] *Johnson v. Zema Systems Corp.*, 170 F.3d 734 (7th Cir. 1997).

are not the subject of *any* objection can be considered. *United States v. Vonn*, 122 S.Ct.1043; 152 L.Ed.2d 90 (2002).

CONCLUSION

THEREFORE, Petitioner ERIC WAYNE, requests of this Court that it GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPECTFULLY SUBMITTED,

MARY CATHERINE BONNER, ESQ.
Counsel of Record
207 S.W. 12th Court
Ft. Lauderdale, FL 33315
(954) 523-6225
Attorney for Petitioner

No. 01-2378

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America,
Appellee,

v.

Eric Alan Wayne,
Appellant.

Appeal from the United States
District Court for the
Northern District of Iowa

JUDGMENT

After consideration of the court, appellant's motion to expand the certificate of appealability is denied and appellee's motion to dismiss the appeal is granted.

(5361-010199)

November 20, 2001

Order entered at the Direction of the Court

Clerk, U.S. Court of Appeals Eighth Circuit

No. CR 88-17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ERIC ALAN WAYNE,
Defendant

SUPERCEDING INDICTMENT
21U.S.C. § 846
21U.S.C. § 841(a)(1)
18 U.S.C.§ 2

The Grand Jury charges;

COUNT 1

On about April 26, 1967, within the Northern District of Iowa and elsewhere, ERIC ALAN WAYNE did knowingly and intentionally possess with the intent to distribute and aid and abet the possession with the intent to distribute, in the Northern District of Iowa, approximately 2 kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance.

This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 2

On about April 29, 1987, within the Northern District of Iowa, ERIC ALAN WAYNE did knowingly and intentionally possess with the intent to distribute and aid and abet the possession with intent to distribute, in the Northern District

of Iowa, approximately 3 kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance.

This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

Between about September 9 and September 11, 1987, within the Northern District of Iowa and elsewhere, ERIC ALAN WAYNE did knowingly and intentionally possess with the intent to distribute and aid and abet the possession with intent to distribute, in the Northern District of Iowa, approximately 3 kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance.

This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section. 2.

COUNT 4

On or about October 13, 1987, within the Northern District of Iowa and elsewhere, ERIC ALAN WAYNE did knowingly and intentionally possess with the intent to distribute and aid and abet the possession with intent to distribute, in the Northern District of Iowa, approximately 1 kilogram of cocaine, a Schedule II Narcotic Drug Controlled Substance.

This in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2.

COUNT 5

Between about April, 1982, and about May, 1988, in the Northern District of Iowa and elsewhere, ERIC ALAN WAYNE did wilfully, knowingly, and unlawfully combine, conspire, confederate, and agree with other persons whose names are known and unknown to the Grand Jury, to distribute and possess with the intent to distribute,

marijuana, a Schedule I Controlled Substance, and more than 5 kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

This in violation of Title 21, United States Code, Section 846.

A TRUE BILL

Foreman

RICHARD L. MURPHY,
Assistant United States Attorney

Instruction No. 13

You are instructed as a matter of law that cocaine is a schedule II narcotic controlled substance. You are also instructed as a matter of law that marijuana is a schedule I controlled substance. You must ascertain beyond a reasonable doubt whether or not the substances in question in this case were in fact cocaine and marijuana. In so doing, you may consider evidence in the case which may aid the determination of that issue.

The United States is not required to prove that the amount or quantity of cocaine and marijuana was as charged in the Indictment. It need only prove beyond a reasonable doubt that there was a measurable amount of cocaine and/or marijuana as charged in each respective count.

Case Number CR 88—17

United States District Court
Northern District of Iowa

UNITED STATES OF AMERICA

V.

ERIC ALAN WAYNE

(Name of Defendant)

March 21, 1989

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Jane Classer
Leonard Rosenberg
Defendant's Attorney

THE DEFENDANT:
X was found guilty on count(s) 5 of the Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §846	Conspiracy to distribute & possess with intent to distribute marijuana, a Schedule I Controlled Substance, and cocaine, a Schedule II Narcotic Drug Controlled Substance	

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.X The mandatory special

assessment is included in the portion of this Judgment that imposes a fine.

X It is ordered that the defendant shall pay to the United States a special assessment of $50 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
266—17—0527

Defendant's mailing address:
Linn County Jail
Cedar Rapids, Iowa

Defendant's residence address: Linn County Jail
Cedar Rapids, Iowa

Date of Imposition of Sentence
March 17, 1989

Signature of Judicial Officer

Name & Title of Judicial Officer
David R. Hansen, U.S. District Ju4ge

Defendant: Eric Alan Wayne
Case Number CR 88—17
Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 300 months to be served concurrently with the sentence to Imprisonment imposed on count 3 of the companion judgment filed this date.

X The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on 6-5-89 to FCI Ashland, KY at with a certified copy of this Judgment.

United States Marshal

By Deputy Marshall

Defendant: Eric Alan Wayne
Case Number CR 88—17
Judgment—Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years to be served concurrently with the special parole term imposed on count 3 in the companion judgment filed this date.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. Each installment payment of the fine shall be a special condition of supervised release.

2. The defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of a probation officer.

3. The defendant is to provide the probation officer with access to any requested financial information.

4. The defendant is to participate in a program approved by the United States Probation Office for substance abuse, which program may include urinalysis testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Defendant: Eric Alan Wayne
Case Number CR 88-17
Judgment—Page 4 of 5

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) .the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: Eric Alan Wayne
Case Number CR 88—17
Judgment—Page 5 of 5

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $100,050, consisting of a fine of $ 100,000 and a special assessment of $ 50.
X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:
Together with the $100,000 fine imposed on count 3 in the companion judgment, the defendant is fined a total of $200,000.

Of the total fine, $50,000 is to be paid within 30 days. An additional $50,000 is to be paid within 90 days. The balance of the fine is to be paid during the defendant's incarceration and term of supervised release pursuant to a repayment plan devised by the U.S. Probation Office and -the defendant and submitted to the court for approval.

APPROVAL AS TO FORM

The undersigned has reviewed the foregoing judgment and it is approved as to form.

Assistant United States Attorney

ISSUES PRESENTED

GROUND ONE: The United States Attorney for the Northern District of Iowa suppressed evidence favorable to Petitioner, notwithstanding timely demand for discovery, and thereby obtained a conviction in violation of Brady v. Maryland, 373 U.S. 83,83 S.Ct. 1994,10 L.Ed. 2d 215 (1963), as further interpreted and clarified by Kyles v. Whitley, ___ US. ___, 115 S. Ct. 1555; 131 L.Ed. 2d 490 (1995) which must now be set aside.

GROUND TWO: Trial counsel rendered ineffective assistance of counsel in the following regards:

A. Counsel failed to ascertain the identity of all alleged conspirators and the scope and specific time frames of such alleged conspiracy, and the specific dates of the substantive charges.

B. Counsel failed to investigate and/or to interview witnesses who possessed relevant, material and/or exculpatory evidence which should have been introduced on Mr. Wayne's behalf at trial.

C. Counsel failed to seek from the court an order determining that the enforced secrecy clause of the informants' agreements violated Mr. Wayne's Sixth Amendment rights.

E. Counsel failed to move to dismiss this Indictment based upon the unlawful, obstructionist restriction on government witnesses and their total preclusion from interview by the defendant and others.

F. Counsel failed to demonstrate to the court that the allegations which were being tried as one conspiracy actually demonstrated the existence of multiple conspiracies, perhaps with overlapping membership, and failed to urge that the mere role of seller does not satisfy

requirements for proof of knowing, willful intentional membership and participation in a conspiracy.

G. Counsel failed to investigate alibi defenses available to the Petitioner, notwithstanding that Petitioner suggested the availability and viability of such witnesses and of such a defense, and further failed to either obtain the return of the Petitioner's papers and books seized from the Petitioner's residence in order that these might be utilized to establish the alibi defense or to cause independent reconstruction of such records.

H. Counsel specifically failed to secure exculpatory evidence from alleged conspirator Larry Shreeves which was material and relevant to Mr. Wayne's innocence on the only substantive count of conviction though such was available from Mr. Shreeves or through others.

I. Counsel failed to investigate specific witnesses, alleged coconspirators including but not limited to Marcos Melendez, Pete Taylor and others and to secure theft presence as defense witnesses.

J. Counsel failed to independently test the cocaine packaging and to ascertain the identity of the fingerprints concededly found thereon.

K. Counsel failed to present expert witness testimony concerning the likelihood that the testimony of the government, drug user/addict witnesses, was tainted by their lack of perception, their lack of memory, particularity of detail, etc. due to the degradation of their brains from such drug use/addiction, hence their testimony was taken by the jury as if it were being recollected by a healthy non drug addict witness.

L. Counsel failed to object to alleged co-conspirator hearsay which came in through testifying informant witness Shelton.

M. Counsel failed to present a credible witness/former law enforcement officer, who had relevant, material impeaching information which went to the heart of the credibility of chief government witness Barton Hoffman.

N. Counsel failed to specifically demand information to which the defendant was entitled under Title 18 United States Code, Section 3500 subsequent to the testimony of all government witnesses, hence no 3500 material was produced and the defendant was forced to rely on his prior inspection and "note-taking" of miscellaneous, non numbered documents purporting to constitute the entirety of the discovery.

O. The court, at sentencing, was presented by the government ex parte and in camera certain information to which the Petitioner had sought access and which the Petitioner urged was relevant and material and which he further urged was knowingly withheld in violation of Brady v. Maryland, 373 U.S. 83(1963) and/or in violation of Title 18 Section 3500. Counsel was ineffective in that he did not seek to have the totality of the information which was reviewed by the court preserved for independent review by the United States Court of Appeals for the Eighth Circuit.

P. Counsel sought the release of relevant portions of the confidential informants' presentence investigation reports. When the court, in spite of learning of the suppressed evidence on witnesses Hoffman, Newland, and Shelton, denied release of such information on witnesses other than Shelton, counsel did not seek to have the totality of those presentence investigative reports preserved for independent review by the United States Court of Appeals for the Eighth Circuit. (Mr. Wayne refers this Court to the previous footnote).

Q. Counsel failed to seek release of the "discovery" produced in cases alleged against conspirators, particularly in light of the fact that the suppressed Hoffman notes which resulted in vacation of Counts 1 & 2 were

allegedly contained in discovery for the case of a co-conspirator.

R. Counsel failed, after the Court's ruling on Barton Hoffman, to revisit the suppression issue in spite of the existence of law enforcement testimony that Barton Hoffman was the sole substantive affiant underlying the search warrant.

S. Counsel failed, after the Court's ruling on Barton Hoffman, to revisit his previously-made objections to the Pinkerton instruction; failed to urge that such information could not underlie a guideline sentencing enhancement for gun possession nor for role in the offense, i.e. Leader and Organizer.

T. Counsel failed to retain a guideline sentencing expert to assist in making all legal and factual challenges to the sentence(s) imposed though Petitioner sought such expert's retention and trial counsel in fact conceded his own lack of expertise in this area.

U. Counsel accepted as truthful and complete the excuse of the government for its hiding of discovery materials and failed to either cross examine the proffer of the government giving its "excuses" for non-compliance or to seek an evidentiary hearing at which time evidence would be required to be produced by the government under oath and subject to cross-examination.

V. Counsel failed to present ameliorating personal and medical evidence, which was readily available, to the trial court on the issues of Mr. Wayne's pre-guideline sentence and on the issue of the proper sentence to be imposed within the guideline range.

W. Counsel recognized that the court intended to impose separate guideline and non-guideline sentences and he nonetheless failed to urge upon the court the court's obligation to evaluate total punishment for the

combined offense conduct and further failed to urge the court's consideration of the clear Congressional expression of public policy that several charges growing out of a single criminal episode should be encompassed in one sentence.

GROUND THREE: Appellate counsel rendered ineffective assistance of counsel in the following ways:

A. Counsel failed to ascertain the identity of all sealed, undocketed information and the unsealing of same.

B. Counsel failed to (1) ascertain whether the suppressed Barton Hoffman discovery materials reviewed by the trial court in camera had been preserved for review; and, if so, (2) failed to seek the unsealing of such documents and the independent review by the Appellate Court of whether said documents constituted information which should have been divulged by the government pursuant to its obligations under Brady or under the Jencks Act, or in the alternative failed to seek reconstruction and supplementation of the record to include such materials. (Mr. Wayne would cite the Court to Footnote 1).

C. Counsel failed to unseal the presentence investigation reports of admitted liar Barton Hoffman and of Newland in order to ascertain whether the trial court had been correct in withholding the specifically requested information from these reports–the government's version of the offense and the statements of those defendants.

D. Counsel failed to urge the Court of Appeals to reconsider the trial court's suppression determination and it's determination of the guideline enhancements of Leader and Organizer and possession of a firearm in light of the trial court's findings about the credibility of the sole substantive affiant, Barton Hoffman.

E. Counsel failed to argue the clear error of the trial court in its determination that it need not require that testimony sought to be introduced as coconspirator hearsay have been made during the course of and in furtherance of the conspiracy.

F. Appellate counsel failed to competently and completely address guideline and sentencing errors including the court's failure to respect the intent of Congress for true, effective, meaningful concurrency of sentences which reflect the
total offense.

G. Appellate counsel conceded that other, extensive, pressing personal and legal business coupled with his own illness rendered the time available to him to prepare the appellate presentation on Mr. Wayne's behalf inadequate.

H. Appellate counsel never conferred with the Petitioner, and refused to consider, discuss and raise certain viable issues which the Petitioner wished raised.

I. Appellant's counsel was retained to seek Certiorari review of this matter before the United States Supreme Court and failed to do so.

Supreme Court, U.S.
FILED

011769 APR 19 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

ERIC WAYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

Mary Catherine Bonner, Esq.
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Attorney for Petitioner

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27pgs

No. CR 88-17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ERIC ALAN WAYNE,
Defendant.

Filed April 30, 2001

This matter came before the Court and

IT IS ORDERED AND ADJUDGED THAT

Plaintiff, Eric Wayne, take nothing on his first four claims and a certificate of appealability as to these claims is therefore denied.

IT IS FURTHER ORDERED AND ADJUDGED THAT

Plaintiff take nothing on his portion of § 2255 motion, as amended, asserting an Apprendi violation and a certificate of appealability as to this claim is granted.

DATED: April 30, 2001

James D. Hodges, Jr.
Clerk
(By) Deputy Clerk

No. CR 88-17 C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ERIC ALAN WAYNE,
Defendant.

Filed April 30, 2001

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This matter comes before the court pursuant to the September 12, 2000, Report and Recommendation filed by Magistrate Judge Paul A. Zoss on defendant Eric Alan Wayne's amended motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on two drug-trafficking offenses. Both parties have filed objections to the Report and Recommendation, necessitating de novo review of at least some of the issues presented. The critical issue in this matter is the impact upon convictions for drug offenses more than a decade ago of the Supreme Court's recent

decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which now requires that drug quantity be alleged in an indictment and submitted to a jury for determination beyond a reasonable doubt.

I. INTRODUCTION

A. Trial and Sentencing

Defendant Eric Alan Wayne came to trial on October 4, 1988, on a superseding indictment charging him with five drug-trafficking offenses. Although the indictment alleged that the offenses charged involved various approximate quantities of controlled substances, in accordance with circuit precedent at the time, the jury was not asked to determine quantity beyond a reasonable doubt. Instead, the jury was instructed that it need only determine whether a measurable amount of a controlled substance was involved in each offense charged. On October 12, 1988, the jury convicted Wayne on Counts I, II, III, and V of the indictment, but acquitted him on Count IV.

On March 3, 1989, the trial court granted Wayne's motion for a new trial on Counts I and II, on the ground that the government had withheld certain evidence, but sentenced Wayne on Counts III and V. On Count III, which charged. Wayne with possession of approximately three kilograms of cocaine with intent to distribute it and aiding and abetting possession with intent to distribute, the trial court imposed a pre-Guidelines sentence of forty years. On Count V, which charged Wayne with conspiracy to distribute and to possess with intent to distribute marijuana and more than five kilograms of cocaine, the trial court imposed a sentence of 300 months imprisonment pursuant to the Sentencing Guidelines. Each sentence was enhanced above the twenty-year maximum sentence authorized for indeterminate quantities of controlled substances by 21 U.S.C. § 841(b)(1)(C), based on quantities of cocaine in excess of 500 grams, pursuant to 21 U.S.C. § 841(b)(1)(B)(ii)(II),

B. Wayne's § 2255 Motion

Wayne filed his present collateral attacks on his sentences on Counts III and V pursuant to 28 U.S.C. § 2255 on April 21, 1997. Wayne's § 2255 motion, as amended on March 27, 2000, raises five issues: (1) that the convictions were obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), as reinterpreted in Kyles v. Whitley, 514 U.S. 419 (1995); (2) that trial counsel was ineffective in numerous respects; (3) that appellate counsel was ineffective in several respects; (4) that trial counsel was ineffective in failing to raise certain sentencing issues; and (5) that the district court cried in not submitting the threshold statutory drug amounts for enhanced sentencing to the jury and in not requiring the government to prove the amounts involved beyond a reasonable doubt, a so-called "Apprendi violation," after Apprendi v. New Jersey, 530 U.S. 466 (2000).

In a Report and Recommendation filed September 12, 2000, Judge Zoss recommended that relief be denied on the first four claims asserted, but recommended that Wayne be granted relief on his Apprendi claim. Specifically, Judge Zoss recommended that Wayne's sentences on Counts III and V be vacated and that Wayne be resentenced to twenty years imprisonment on Count III and 240 months imprisonment on Count V, with the sentences to run concurrently.

Wayne filed objections to portions of Judge Zoss's Report and Recommendation on September 22, 2000. As to his first four claims, Wayne relied on his prior briefing of the issues and submitted only the general contention "that errors of fact and law were made by the Magistrate Judge and that that Court erred when relief was not given on each of the aforementioned relief bases. " Mr. Wayne's Objections To Certain Portions Of Magistrate Judge Zoss' Report and Recommendation (Wayne's Objections) at 1. As to Judge Zoss's recommended disposition of his Apprendi claim, Wayne objected as follows:

> The Magistrate Judge engaged in a complete analysis with regard to the Apprendi/elements of the crime issue. Mr. Wayne agrees with the conclusion reached by the Magistrate Judge that Apprendi mandates relief for Mr. Wayne. However, he would submit that an appropriate sentence under section c [of 21 U.S.C. § 841(b)(1)] must be arrived at after a sentencing hearing by this Court Mr. Wayne objects to the conclusion of the Magistrate Judge that he must be sentenced to the highest possible sentence under section c as there is no minimum sentence mandated by that section,

Id. Thus, as to the Apprendi claim, Wayne objects only to the relief recommended.

The government also filed objections to Judge Zoss's recommended disposition of the case on September 22, 2000, specifically objecting to various details in Judge Zoss's recitation of the facts and procedural history of the case and asserting certain additional information should have been included. Of more moment are the government's contentions that Judge Zoss erred in concluding that the Apprendi decision applies retroactively to eases on collateral review and by rejecting the government's argument that any error in failing to present the drug quantity issue to the jury in this case was harmless given the strength of the evidence presented at trial and the prior findings by the district and appellate courts regarding the strength of that evidence. The government also asserted that Judge Zoss had improperly ignored the government's contention that Wayne's present petition is a "second or successive motion," filed without the certification of the Eighth Circuit Court of Appeals required by 28 U.S.C. § 2244. Wayne filed a reply to the government's objections on October 4, 2000.

By letter to counsel dated October 31, 2000, the undersigned advised the parties that the court intended to take a 'wait and

see" approach to Judge Zoss's Report and Recommendation, at least for a reasonable time, in light of the rapid pace with which the federal Circuit Courts of Appeals were addressing Apprendi issues on direct appeals and collateral reviews, hoping for some guidance from the Eighth Circuit Court of Appeals on the "retroactivity" of Apprendi to cases on collateral review. The court further requested status reports from the parties, for example, every thirty days, concerning decisions addressing the retroactive application of Apprendi.

In response to the court's letter, Wayne filed a status report on December 29, 2000, and the government filed a status report on February 12, 2001. Wayne's status report cited no controlling authority that would be dispositive of his § 2255 motion. However, the government suggested that Wayne's § 2255 motion could be resolved on two grounds, on the basis of recent, controlling authority from the Eighth Circuit Court of Appeals. The first such ground was "harmless error," pursuant to the decision of the Eighth Circuit Court of Appeals in United States v. Anderson, 236 F.3d 427 (8th Cir. 2001). The second ground was failure to show "prejudice" to sustain the "Apprendi claim," pursuant to United States v. Sturgis, 238 F.3d 956 (8th Cir. 2001), because Wayne's longer sentence, forty years on Count III, did not exceed the maximum possible sentences for indeterminate quantities of cocaine on Counts III and V, twenty years each, if served consecutively.

In an order dated March 6, 2001, the court recognized that either of the arguments raised in the government's February 12, 2001, status report was potentially dispositive of Wayne's motion, without consideration of the "retroactivity' issue concerning the applicability of Apprendi to Wayne's action for collateral review. Therefore, the court directed the parties to tile supplemental briefs concerning the grounds for disposition of this matter raised in the government's February 12, 2001, status report, on or before

March 20, 2001, and reply briefs on or before March 25, 2001. The court also directed the parties to bring to the court's

attention any controlling authority that was handed down in the interim concerning the propriety of "retroactive" application of the Apprendi decision to the present case. On March 15, 2001, upon the oral request of Wayne's counsel, the court entered a written order extending the parties' briefing deadlines to March 27 2001, for supplemental briefs and to April 2, 2001, for any reply briefs.

The government filed its supplemental brief on March 20, 2001, and Wayne filed his on March 27, 2001. On March 28, 2001, the government moved to strike Wayne's supplemental brief as untimely, apparently because the government bad never received a copy of the court's order of March 15, 2001, extending the briefing deadlines. On March 29, 2001, the court denied the government's motion to strike Wayne's supplemental brief, but granted the government's alternative motion for a further extension of time to file a reply brief. Consequently, the court granted the parties an extension, to and including April 6, 2001, to file any reply to the opposing party's supplemental brief. The government filed a reply to Wayne's supplemental brief on April 6, 2001, but Wayne did not submit any further timely briefing.

On April 24, 2001, however, well after the deadline for reply briefs, Wayne submitted a "Request For This Court To Accept His Reply To The Government's Response," and the "Reply" itself, asserting that Wayne's counsel had not received a copy of the government's supplemental brief until after it had been "lost in the mails for over one week and counsel had to obtain a copy from Chambers." Wayne gives no explanation for his failure to request a copy of the government's brief at or shortly after the deadline for the filing of supplemental briefs and no explanation for failing to move for an extension of time to file a reply brief until well after the deadline for such replies had long passed. The court does not condone such dilatory conduct. Nevertheless, the court's review of Wayne's very belated reply brief indicates that it advances no new arguments and identifies no new evidence, such that the government will not be prejudiced if the court considers the untimely reply. Therefore, the court will, albeit reluctantly,

consider Wayne's belated reply brief, and this matter is now fully submitted.

II. LEGAL ANALYSIS

A. Standard Of Review For A Report And Recommendation

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations by the magistrate [judge] may also receive further evidence or recommit the matter to the magistrate [judge] with instructions.

28 U-SC. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a de novo review of a magistrate judge's report where such review is required. See, e.g. Hosna v. Groose, 80 F.3d 293, 306(8th Cir.) (citing 28 U.S.C. § 636(b)(l)), cert. denied, 519 U.S. 860(1996); Grinder v. Gammon, 73 F.3d 793, 795 (8th Cir. 1996) (citing Belk v. Purkett, 15 F.3d 803, 815 (8th Cir. 1994)); Hudson v. Gammon, 46 F.3d 785, 786(8th Cir. 1995) (also citing Belk). Because objections have been filed in this case, the court must conduct a de nova review.

However, the plain language of the statute governing review provides only for de novo review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court finds that Wayne's "objections" to Judge Zoss's recommended disposition of his first four claims do not meet the requisite

specificity to invoke de nova review. A general objection "that errors of fact and law were made," see Wayne's Objections at 1, does not constitute an objection to "those portions of the report or specified proposed findings or recommendations." See 28 U.S.C. § 636(b)(1) (emphasis added). Nor does Wayne's reference to his prior briefing of these four claims somehow provide the requisite specificity, because prior argument cannot constitute objection to any portion of a later report, finding of fact, or recommendation. Thus, the court concludes that Wayne has not raised objections requiring de nova review of the recommended disposition of his first four claims. Therefore, the recommendation concerning those claims will be reviewed only for clear error.

On the other hand, Wayne's objection to Judge Zoss's recommendations concerning his resentencing does meet the requisite specificity to invoke de novo review, if the court uphold's Judge Zoss's recommendation that Wayne's sentences must be vacated pursuant to Apprendi. Similarly, the government's specific objections to Judge Zoss's recommendations concerning Wayne's Apprendi claim certainly do require de novo review. Therefore, the court concludes that it must make a de nova review only of the Apprendi claim on which Judge Zoss recommended that relief be granted. See id. (de novo review is required only of "those portions of the report or specified proposed findings or recommendations to which objection is made") (emphasis added).

B. Harmless Error

Upon de novo review of Judge Zoss's Report and Recommendation concerning Wayne's Apprendi claim, and upon consideration of the parties' supplemental briefing and replies, however belated, the court concludes that the government's assertion of "harmless error" is dispositive of Wayne's Apprendi claim. This is so, even if Wayne's Apprendi claim is otherwise on the proper procedural footing-that is, not part of an unauthorized "second or successive" petition,

see 28 U.S.C. § 2244-and even assuming further that Apprendi is retroactively applicable to cases on collateral review. But see United States v. Sanders, __F.3d __, __, 2001 WL 369719, *1(4th Cir. April 13, 2001) ("[B]ecause the new rule of criminal procedure announced in Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively on collateral review, we affirm the district court's dismissal of Sanders' habeas petition [pursuant to § 2255]."). The government's assertion of "harmless error" is premised on United States v. Anderson, 236 F.3d 427 (8th Cir. 2001), a per curiam decision addressing a defendant's direct appeal of his sentence, following conviction by a jury, on a charge of conspiring to manufacture methamphetamine. The court's de nova review of the Apprendi issue therefore begins with consideration of the Anderson decision and the applicability of "harmless error" review to Apprendi claims raised in actions for collateral review of convictions or sentences.

1. The Anderson decision

In Anderson, the Eighth Circuit Court of Appeals found that the district court had "contravened the rule of Apprendi" by finding that the conspiracy with which the defendant was charged involved fifty or more grams of methamphetamine and imposing a sentence of thirty years. when the jury found only that the defendant conspired to produce a "measurable amount" of methamphetamine, rather than a specific drug quantity. Anderson, 236 F.3d at 429. However, the reviewing court concluded that "[t]his determination does not end our inquiry, because Apprendi "did not recognize or create a structural error that would require per se reversal." Id. (quoting United Stales v. Nealy, 232 F.3d 825, 829 (11th Cir. 2000)). Therefore, the court's inquiry continued as follows:

> We have held that in light of Apprendi, "[D]rug quantity must often be treated as an element of the offense under § 841." United States v. Sheppard, 219 F.3d 766, 767 (8th Cir. 2000). Certainly this is such a case. However, the Supreme Court has held that if a trial court

> errs by omitting an element of the offense from its charge to the jury, instead deciding the element itself, the conviction must still be affirmed if the error was harmless. Neder v. United States. 527 U.S. 1, 8-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Accordingly, we must affirm the appellants' sentences unless we find that "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted evidence." Id. at 19, 119 S. Ct, 1827.
>
> In this case, there was overwhelming evidence that appellants conspired to produce amphetamine in a quantity sufficient such that appellants' thirty-year sentences do not exceed the statutory maximum as proscribed by Apprendi.

Anderson, 236 F.3d at 429 (footnote omitted).[1] After reviewing the evidence of drug quantity that the court had described as "overwhelming," the court concluded, "Because no rational jury could have found appellants guilty of the substantive offense, yet at the same time found that the amount of methamphetamine the conspiracy sought to produce was less than five grams [the threshold for enhanced sentencing], we hold the Apprendi error to be harmless beyond a reasonable doubt." Id. at 430 (citing Nealy, 232 F.3d at 830).[2] Thus, Anderson expressly authorizes application of a "harmless error" standard to the lack of jury determination of drug quantity.

2. Wayne's opposition to "harmless error" review

Wayne, however, contends that the applicable decision of the Eighth Circuit Court of Appeals is not Anderson, but an unpublished decision in United States v. Crank, 2001 U.S. App. LEXIS 3439 (8th Cir, March 6, 2001), a copy of which is attached to his supplemental brief. Wayne contends that, in Crank, the Eighth Circuit Court of Appeals vacated a

sentence of 245 months, which exceeded the sentence for an indeterminate amount of cocaine base, on the ground that "the quantity was approximated in the charging document but the jury was forbidden to deliberate on the quantity element." Mr. Wayne's Further Briefing (Defendant's Supplemental Brief) at 11. He contends that his situation is analogous, because drug quantity was only approximated in the indictment against him and the jury instructions forbade the jury from determining quantity, instead permitting the jury to determine only whether a measurable amount of a drug was involved in each offense. Thus, Wayne's contention appears to be that his sentence must be vacated pursuant to Crank, not reviewed for "harmless error" pursuant to Anderson.

However, Wayne has mischaracterized Crank. In Crank, the court actually stated the following:

> Turning to Crank's sentence, we conclude the district court's decision to hold Crank accountable for 1.4 kilograms of cocaine base for sentencing purposes, after cautiously taking into consideration one of the witness's tendency to exaggerate, was not clearly erroneous. See United States v. Padilla-Pena, 129 F.3d 457, 467 (8th Cir. 1997) (reviewing court is particularly hesitant to find clear error in district court's drug quantity findings where those findings are based on determinations of witness credibility), cert. denied, 524 U.S. 905, 906(1998). Nevertheless, we must vacate the 245-month prison terms imposed on the conspiracy and cocaine-base distribution convictions and remand for reconsideration in light of recent Supreme Court directives. See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435(2000) (other than fact of prior conviction, any fact that increases penalty beyond prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt).

> Where, as here, the quantity of drugs was not alleged in the indictment or submitted to the jury, Crank could not be sentenced above the twenty-year statutory maximum prison term he faced, without reference to drug quantity, for his involvement in these schedule II controlled substances. See 21 U.S.C. 841(b)(1)(C) (authorizing maximum twenty-year prison term for first-time felony schedule II controlled substance offenders, and minimum three-year supervised release term); United States v. Nicholson, 231 F. 3d 445 452 55 (8th Cir. 2000), petition for cert. filed, (Jan. 29, 2001) (No. 00-8376).

Crank, 2001 U.S. App. LEXIS 3439 at *3-*4 (emphasis added). Nowhere does the decision in Crank suggest, as Wayne argues, that "the quantity was approximated in the charging document; rather, the decision expressly states that "the quantity of drugs was not alleged in the indictment." Id. at *3 (emphasis added). Thus, even assuming that Crank stands for the proposition that the court must vacate a sentence when drug quantity is neither charged in the indictment nor submitted to jury determination, Crank is clearly distinguishable from the present case, in which drug quantity was stated in each charge of the indictment. In such circumstances, Anderson requires the court to review whether failure to submit the determination of drug quantity to the jury was harmless beyond a reasonable doubt. See Anderson, 236 F.3d at 429.

Nor does Wayne's argument that quantity was only approximated in the indictment in his ease require the court to forego "harmless error review and simply vacate his sentence. in United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000), the indictment charging the defendant with possession of cocaine base with intent to distribute it did not state any quantity. Swatzie, 228 F.3d at 1280. After determining that the evidence was such that "a jury could not . . . have concluded that Swatzie possessed a controlled substance with intent to

distribute, but did not possess at least 5 gm of cocaine base," the sentencing enhancement threshold for cocaine base, the court also observed, "Swatzie [has not] hinted that, for lack of notice from the indictment, he had difficulty disputing the issues of either the kind of drugs or the quantity. Reversing the judgment in these circumstances would thus itself 'bestir the public to ridicule' the judicial process." Id. at 1284 (quoting Johnson v. United States, 520 U.S. 461., 470 (1997), in turn quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50(1970)). For these reasons, the court in Swatzie declined to notice any plain error. Id.

In Wayne's case, Count III of the indictment charged that Wayne "did knowingly and intentionally possess with intent to distribute and aid and abet the possession with intent to distribute. approximately three kilograms of cocaine," see Trial Transcript, Vol. I, 113 (emphasis added), and Count V of the indictment charged Wayne with conspiracy to distribute and possess with intent to distribute, marijuana . . . and more than five kilograms of cocaine " See id. at 114 (emphasis added). Although Wayne contends that the indictment only charges quantities "approximately," he does not explain how the language of the indictment, which clearly identified the controlled substances at issue and clearly established that quantities in excess of the threshold amounts for enhanced sentencing were at issue, "for lack of notice. . . [gave him] difficulty disputing the issues of either the kind of drugs or the quantity." Swatzie. 228 F.3d at 1284.

Moreover, this court can find no decision holding that Apprendi requires that an indictment state exact amounts of controlled substances, rather than approximations. Indeed, in Apprendi, the Supreme Court embraced the proposition stated in Jones v. United States, 526 U.S. 227 (1999), that, "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476 (quoting Jones,

526 U.S. at 243 n. 6). Under 28 U.S.C. § 841(b), facts that "increas[e] the maximum penalty for a [drug] crime" include the quantity of drugs stated in approximate terms of so many grams or kilograms "or more of the specified substance. See 28 U.S.C. § 841(b)(1)(A)-(C). Thus, any indictment language that specifies an approximate quantity in excess of a statutory "breakpoint" in § 841(b), such as "500 grams or more of a mixture or substance containing a detectable amount of. . . cocaine," see 28 U.S.C. § 841(b)(1)(B)(ii)(II), satisfies the requirements of Apprendi. Counts III and V of the indictment in question here undoubtedly met this requirement, where they alleged "approximately three kilograms of cocaine" and "marijuana . . . and more than five kilograms of cocaine. . . .", respectively, thus alleging quantities that satisfy the Apprendi/Jones requirement to allege "500 grams or more" of cocaine to give notice of the applicable enhancement of the maximum penalty.[3]

Similarly unavailing is Wayne's assertion that another unpublished decision, United States v. Maglothin, 2001 WL 121992, 2001 U.S. App. LEXIS 2095 (8th Cir. 2001), "speaks to the erroneous logic of reading an 'amount' into a conviction to circumvent Apprendi." Defendant's Supplemental Brief at 13. The court cannot fathom how the Maglothin decision speaks to any such proposition. Rather, the court in Maglothin specifically stated that it was applying "plain error" review to Maglothin's Apprendi challenge and concluded that "Maglothin's 168-month prison sentence doesn't violate due process because the statutory maximum sentence for an indeterminate quantity of meth[amphetamine] is 240 months." Maglothin, 2001 WL 121992 at *1. Thus, if anything, the Maglothin decision supports the application of "plain error" or "harmless error" review to failure to submit the issue of drug quantity to the jury.

3. The nature of "harmless error" review

Finding that "harmless error" review is appropriate pursuant to Anderson, the court is also unpersuaded by Wayne's contention that the key issue in this case is that the jury was

never permitted to consider drug quantity, and indeed, was specifically instructed not to consider drug quantity. Wayne contends that, to accept the government's arguments, the court would have to conclude that the jury ignored such instructions and made a drug quantity determination matching the amounts charged in the indictment. This argument simply misses the point: It is clear that, if Apprendi is retroactively applicable to cases on collateral review, Apprendi would have required submission of the drug quantity issues to the jury, and that Failure to do so constituted an "Apprendi error." See Anderson, 236 F.3d at 429. However, where 'harmless error' review is appropriate, that conclusion does not end the inquiry. Id. Rather, the question is not whether the jury ignored instructions, or whether some drug quantity "finding" is implicit in the jury's determination of guilt on a particular offense, but whether, in light of the evidence presented, "no rational jury could have found (the defendant) guilty of the substantive offense, yet at the same time [have] found that the amount of [controlled substances] was less than (the threshold for enhanced sentencing]." Anderson 236 F.3d at 430. To put it another way, on review for "harmless error," the question is whether there was overwhelming evidence of drug quantity on Counts III and V such that Wayne's sentences do not exceed the statutory maximums as proscribed by Apprendi. Anderson, 236 F.3d at 429.

Thus, the court must also reject Judge Zoss's conclusion that "the Government's argument that the error was harmless [is] disingenuous, where a resentencing would reduce the length of Wayne's imprisonment." Report and Recommendation at 39. The question on "harmless error" review is not whether resentencing based on indeterminate quantities would have resulted in a shorter sentence—indeed, the fact that sentencing on indeterminate quantities would result in a shorter sentence merely begs the question of whether the error in taking from the jury the question of drug quantity was "harmless." The proper question is whether failure to submit the question of drug quantity to the jury was "harmless," because no rational jury could have found a drug

quantity less than the amount required to impose an enhanced sentence. See Anderson, 236 F.3d at 429-30.

4. Evidence of drug quantity

In Anderson, the evidence that the court found established drug quantity so "overwhelmingly" that any Apprendi violation in failing to submit the drug quantity question to the jury was 'harmless" consisted of the following:

> It is undisputed that law enforcement officers seized approximately 100 grams of pseudoephedrine, the main precursor chemical far making methamphetamine, from the residence of appellants' coconspirator. The prosecution introduced expert testimony that this quantity of pseudoephedrine could theoretically yield about ninety-two grams of methamphetamine. Appellants' own expert concurred with this yield estimate. To be sure, the relevant inquiry is not what a theoretical maximum yield would be or even what an avenge methamphetamine cook would produce, but what appellants themselves could produce. United States v. Cole, 125 F.3d 654, 655 (8th Cir. 1997). However, appellants' co-conspirator was an experienced cook, the defense expert conceded that the conspirators' recipe was viable, if crude, and a search by authorities revealed traces of methamphetamine on laboratory equipment.

Anderson, 236 F.3d at 429-30 (footnotes omitted). Wayne argues that, in Anderson, the parties' experts agreed on the quantity of methamphetamine at issue, hut in his case. There was no such agreement of experts. Nevertheless, the court finds that the evidence of drug quantity on Counts III and V against Wayne was equally "overwhelming."

The government contends, and the court finds, that the evidence of drug quantity on Counts III and V of the indictment against Wayne was undisputed at trial. As the government points out, witness Newland's evidence on the possession-with-intent charge in Count III was that Wayne possessed three kilograms of cocaine with intent to distribute it to Newland and that Newland in fact purchased three kilograms of cocaine from Wayne. See Trial Transcript, Vol. IV, at 753-54. Although Wayne's trial counsel cross-examined Newland extensively over the arrangements to drive the cocaine to Iowa, where the person Newland identified as the driver did not have a driver's license or credit card, nowhere in that cross-examination did counsel attempt to cast any doubt on Newland's testimony that the transaction involved three kilograms of cocaine. See id. at 838-41. Again, in closing arguments—which are not evidence in any event—trial counsel impugned the credibility of Newland's testimony about arrangements to transport the cocaine back to Iowa, but never contested that the transaction involved three kilograms of cocaine. Id., Vol. V, at 971-75. Although Wayne may have challenged the "credibility" and "viability" of the prosecution, he never challenged the quantity of drugs upon which Count III was based. See United States v. Terry. 240 F.3d 65, 74 (1st Cir. 2001) (the defendant's defense of entrapment did not challenge the evidence of drug quantity, so that the error in failing to submit drug quantity to jury determination was harmless); (United States v. Nealy, 232 F.3d 825, 829-30 (11th Cir. 2000) (any Apprendi error based on drug quantity was harmless, where the defendant did not contest the quantity of drugs at trial): Surratt v. United States, __ F. Supp. 2d __, 2001 WL 391858, *2 (D. Minn. March 30. 2001) (holding on a § 2255 motion, that an alleged Apprendi error was "harmless," in light of "undisputed evidence of drug quantity at trial"); Robinson v. United States, 129 F. Supp. 2d 627, 631 (S.D.N.Y. 2001) (on a § 2255 motion, an Apprendi error was "harmless," even in light of evidence that another person testified that the drugs were his, because '[t]here was no challenge to the drug quantity, either at trial or at sentencing [so that] [m]ovant effectively conceded the amount"); Levan v. United States, 128 F. Supp. 2d 270, 278-79

(ED. Pa. 2001) (reasoning that an Apprendi error was "harmless," where drug quantity evidence was presented to the jury at trial without dispute); United States v. Gibbs, 125 F. Supp. 2d 700, 706 (E.D. Pa. 2000)(same). Because the only evidence ever associated with the charge in Count III was three kilograms of cocaine, and that evidence was never contested, no rational jury could have found Wayne guilty of possession of cocaine with intent to distribute it, as charged in Count III, yet at the same time have found that the amount of cocaine involved was less than the 500 gram threshold for a forty-year sentence. See Anderson, 236 F.3d at 430. Thus, the Apprendi error in failure to submit drug quantity to the jury on Count III-if, indeed, Wayne's case was retroactively subject to Apprendi—was thus harmless beyond a reasonable doubt.

Turning to Count V, on which Wayne was sentenced to 300 months, the trial transcript again provides copious and unchallenged evidence that Wayne was involved in a conspiracy to distribute multiple kilograms of cocaine—that is, beyond a reasonable doubt, the conspiracy involved cocaine in excess of the 500 grams required for a sentencing enhancement of up to forty years pursuant to 21 U.S.C. 841(b)(1)(B)(ii)(Ii). See 21 U.S.C. * 846 ("Any person who. . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the. . . conspiracy."). Specifically, the trial transcript contained unchallenged evidence of several transactions involving in excess of 500 grams of cocaine, which is the threshold for a sentence of up to forty years pursuant to 21 U.S.C. § 841(b)(1)(B)(ii)(II). See Trial Transcript, Vol. II, 237-38 (two-kilogram transaction in 1987), 240-43 (three-kilogram transaction in 1987), 252 (5- and 10-kilogram transactions in 1980), 255-56 (5-kilogram transactions in 1985 and 1987); id., Vol. IV, 742-44 (two-kilogram transaction in 1986). 747-50 (a two and three kilogram transaction in the spring of 1981). One of those transactions was the substantive offense charged in Count III on which the jury also found Wayne guilty. See Trial Transcript, Vol. IV at 753-57. The failure to

submit drug quantity to the jury on the conspiracy charge in Count V was therefore also "harmless beyond a reasonable doubt," "[b]ecause no rational jury could have found [Wayne] guilty of the substantive offense [of distribution of cocaine], yet at the same time [have] found that the amount of [cocaine] the conspiracy [involved] was less than (the threshold for enhanced sentencing]." Id. at 430 (citing Nealy, 232 F.3d at 830).

Wayne contends, however, that his trial counsel had no incentive to contest drug quantity at trial, when drug quantity was treated as a sentencing factor for the court's determination under controlling precedent at the time. He contends further that his trial counsel did strenuously contest the inconsistencies in the drug quantity evidence at sentencing. See Wayne's Supplemental Brief at 12 & n. 13. To the extent Wayne's citations to the transcript of the sentencing hearing even involve arguments by his trial counsel, rather than comments by the court or arguments of the prosecutor, or even relate to drug quantity at all, the court finds that the cited portions of the transcript involve Wayne's trial counsel's challenges to "counting" of certain quantities involved in the conspiracy as attributable to Wayne, challenges to the definiteness of evidence of particular quantities, or challenges to the definiteness of the evidence that certain transactions actually took place all in the context of determining Wayne's offense level under the Sentencing Guidelines. However, nowhere is there a challenge to drug quantity at sentencing amounting to an argument that the conspiracy involved less than 500 grams of cocaine.

Thus, as to both Counts on which Wayne was sentenced, the court finds that there was "over-whelming evidence' that Wayne committed offenses involving quantities of cocaine in excess of 500 grams, "such that [Wayne's] sentence.; do not exceed the statutory maximum as proscribed by Apprendi." Anderson, 236 F.3d at 429. Therefore, any Apprendi violation was harmless beyond a reasonable doubt. Id. at 430.

III. CONCLUSION

Neither party has made objections sufficient to invoke de novo review of Judge Zoss's recommendations for the disposition of the first four of Wayne's claims in his amended motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on two drug-trafficking offenses. Having reviewed the record and Judge Zoss's findings of fact and conclusions of law as they relate to Wayne's first four claims, I find no error and accept the Report and Recommendation as to these claims. Therefore, pursuant to Judge Zoss's recommendation, that part of Wayne's motion asserting his first four claims is denied. Moreover, as to these claims Wayne has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c); see also Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000); Mills v. Norris, 187 F.3d 881, 882 n.1 (8th Cir. 1999); Carter v. Hopkins, 151 F.3d 872, 873-74(8th Cir. 1998); Ramsey v. Bowersox, 149 F.3d 749 (8th Cir. 1998); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998). A certificate of appealability as to these claims is therefore denied.

However, the court rejects Judge Zoss's recommendation as to Wayne's fifth claim in his § 2255 motion, as amended, his assertion of an "Apprendi violation." Instead, upon de novo review, and assuming that Apprendi is retroactively applicable to cases on collateral review, the court concludes that any Apprendi error in Wayne's case was harmless beyond a reasonable doubt. Therefore, that portion of Wayne's § 2255 motion, as amended, asserting an Apprendi violation is also denied. Although a certificate of appealability was otherwise denied above, the court finds that the requirements of 28 U.S.C. § 2253(c) for a certificate of appealability of the disposition of the portion of Wayne's § 2255 motion asserting an Apprendi violation have been satisfied. Therefore, a certificate of appealability as to this claim is granted.

IT IS SO ORDERED

DATED this 30th day of April, 2001.

MARX W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Footnotes

[1]In a footnote, the court in Anderson observed, "The parties disagree as to the appropriate standard of review. Because we conclude that the Apprendi error does not warrant reversal under harmless-error analysis, we need not decide whether the more stringent plain-error standard of review would apply to this case." Anderson, 236 F.3d at 429 n.3. Although *harmless error" and "plain error" both consider the effect of the error upon the verdict, in light of what a jury would have found based on the evidence, the government bears the burden of proving "harmless error," while the defendant or petitioner has the burden of proving "plain error." See, e.g.. United States v. Strickland, __ F.3d __, __, 2001 WL. 320887, *6 (4th Cir. April 3, 2001); see also United States v. Candelario, 240 F.3d 1300, 1307-08 (11th Cir. 2001) ("harmless error" review applies to preserved errors, and "plain error review applies to errors to which no objection was made at trial). As in Anderson, this difference is immaterial here, because this court concludes that even affording Wayne the more generous standard of review, and thus allocating the burden of proof to the government the Apprendi error was "harmless" beyond a reasonable doubt.

[2]Several other Circuit Courts of Appeals considering direct appeals involving Apprendi claims based on lack of jury determination of drug quantity have also applied a "harmless error" or plain error" standard of review. See. e.g.. United Stases v. Strickland, __ F.3d __, __ 2001 WL. 320887. *'7 (4th Cir. April 3, 2001) (on direct appeal, the defendants could not meet their burden to show plain error, because, "as we easily conclude, beyond a reasonable doubt, . . . the jury verdict

would have been the same had the jury been asked specifically to find whether the conspiracy in this case involved more than 5 kilograms of cocaine or 50 grams of crack cocaine"); United Slates v. Candelario, 240 F.3d 1300, 1312 (11th Cir, 2001) (concluding, on direct appeal, that, based on the evidence, "no reasonable jury could have concluded that Candelario was guilty of the substantive offense (possession with intent to distribute cocaine base), but that the amount was less than five grams," thus, the Apprendi error did not affect substantial rights); United States v. Terry, 240 F.3d 65, 74 (1st Cir. 2001) (concluding, on direct appeal, that the defendant could not establish that there were any "prospects. . . that the submission of the question—whether the trigger drug quantity amount was met—to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury," because, given the evidence, and the defendant's defense of entrapment, which did not challenge the quantity evidence, it was impossible to prejudice); United States v. Minus. 237 F.3d 866, 875 (7th Cir. 2001) (on direct appeal, on review for plain error, where the defendant did not preserve the error, the error in failing to submit drug quantity to the jury did not affect the integrity of the verdict, because, in light of the evidence, "had the jury been properly charged, it certainly would have found that Mietus possessed more than 50 kilograms of marijuana," and even if the defendant had properly preserved the argument. "We would find that any error here was harmless"); United States v. Jackson. 236 F.3d 886, 837-88 (7th Cir. 2001) (per curiam) (the defendant could not establish "plain error" in failure to submit drug quantity to the jury, because the evidence of drug quantity was so "overwhelming" that "failure to ask the jury to determine whether the amount was at least 5 grains [of crack cocaine] was harmless far beyond a reasonable doubt"); United States v. Nance 236 F.3d 820, 825-26 (7th Cir. 2000) (concluding, on direct appeal, that there was no "plain error" in failing to submit drug quantity to the jury, because "[i]f this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find that he was conspiring to distribute 5 grams or more

of crack cocaine"); United States v. Keeling, 235 F.3d 533, 539 (10th Cir. 2000) (the defendant could not establish plain error, where drug quantity was not submitted to the jury, because evidence of the defendant's involvement in the marijuana growing operation was overwhelming); United States v, Nealy 232 F.3d 825, 829-30 (11th Cir. 2000) (error in failing to require jury determination of drug quantity was harmless, because the defendant did not contest the quantity of drugs at trial, and in light of undisputed evidence of drug quantity, "no reasonable jury could have rationally concluded that Defendant was guilty of the substantive offense—possession, with intent to distribute the cocaine base in his backpack—but that the amount of cocaine possessed was less than 5 grams"); United States v. Swatzie, 228 F.3d 1278, 1284 (11th Cir. 2000) (where evidence of drug quantity was "overwhelming," there was no plain error, because "a jury could not in this state of evidence have concluded that [the defendant] possessed a controlled substance with intent to distribute, but did not possess at least 5 gm of cocaine base," nor did the defendant suffer from lack of notice of the kind and quantity of drugs at issue).

Moreover, several federal district courts entertaining motions for collateral review based an Apprendi errors involving failure to submit drug quantity to the jury have also applied the "harmless" error" standard embraced in Anderson, or a similar "plain error" standard, which also turns on whether a rational jury could have reached a different conclusion on drug quantity. See, e.g., Surratt v. (United States, — F. Supp. 2d 2001 WL 391858, '2 (D. Minn. March 30, 2001) (on a motion to amend sentence pursuant to 28 U.S.C § 2255, the court, in reliance on Anderson, 236 F.3d at 429, concluded that the Apprendi error in not submitting drug quantity to the jury was harmless, finding that "[b]ecause of the undisputed evidence of drug quantity at trial with regard to Counts 1-3, no reasonable jury could have rationally concluded that Petitioner was guilty of the drug offenses and at the same time found the amount of drugs was less than the amounts listed in the indictment."); Robinson v. United States, 129 F. Supp. 2d 627, 631 (S.D.N.Y, 2001) (on a § 2255 motion, the

defendant could not show a "substantial and injurious effect or influence in determining the jury's verdict,'" as to drug quantity, as required to satisfy "harmless error" review under Neder v. United States, U.S. 119 S. Ct. 1827, 1333-34 (1999), because, even in light of evidence that another person testified that the drugs were his, "[t]here was no challenge to the drug quantity, either at trial or at sentencing [so that] [m]ovant effectively conceded the amount"); Levan v. United States, 128 F. Supp. 2d 270, 278-79 (E.D. Pa. 2001) (reasoning that, although decisions applying harmless error review to Apprendi issues on direct appeal were not controlling in this case pursuant to § 2255, they were instructive, and concluding that, where drug quantity evidence was presented to the jury at trial without dispute, there was no reason to believe that the jury would have found a different quantity than the court did, much less a quantity beneath the sentencing enhancement threshold); United States v. Gibbs, 125 F. Supp. 2d 700, 706 (E.D. Pa. 2000) (same).

[3] Indeed, the allegation in Count V was sufficient to give notice of an enhanced maximum penalty of life imprisonment, pursuant to 28 U.S.C. § 841(b)(1)(A)(ii)(II), which authorizes a maximum penalty of life imprisonment for drug-trafficking offenses involving "5 kilograms or more of a mixture or substance containing a detectable amount of. . . cocaine."